U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 July 2006

CASE NO.: 2005-LHC-1547

OWCP NO.: 3-027585

In the Matter of

CARL E. DEVOR,
Claimant

v.

DEPARTMENT OF THE ARMY,
Employer

and

BROADSPIRE,
Carrier

APPEARANCES:

Michael J. Plank, Esquire
For the Claimant

James M. Mesnard, Esquire
For the Employer

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This case arises from a claim for compensation under the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171, *et seq*. ("Act"), which applies the provisions of the Longshore and Harbor Worker Compensation Act, 33 U.S.C. § 901, *et seq*. ("LHWCA"). 20 C.F.R. parts 701 and 702 contain the implementing regulations for the LHWCA ("Regulations"). The Act provides compensation for disability or death resulting from injury, as defined by the LHWCA, occurring to an employee of a nonappropriated fund instrumentality as described in 5 U.S.C. § 2105, or to a volunteer providing such an instrumentality with services accepted under 10 U.S.C. § 1588, who is-

(1) a United States citizen or permanent resident of the United States or a territory or possession of the United States employed outside the continental United States; or
(2) employed inside the continental United States.

The Act provides the exclusive liability of the United States or a nonappropriated fund instrumentality with respect to the disability or death resulting from injury of an employee referred to by the Act. 5 U.S.C. § 8173.

PROCEDURAL HISTORY[1]

The Claimant filed this claim for benefits on September 26, 2000. (EX 8). In this action, the Claimant seeks permanent total disability benefits for an injury sustained on January 22, 2000. The Claimant received benefits from January 22, 2000-August 5, 2004. (EX 12). The Employer terminated payment of benefits based on a labor market survey that showed the Claimant is employable at no loss of wage earning capacity. The Employer further claimed overpayment from February 6, 2004-August 5, 2004. (EX 12).

On April 27, 2005, the Director, Office of Workers' Compensation Programs ("OWCP") referred this case to the Office of Administrative Law Judges ("OALJ") for a hearing. I was subsequently assigned the case.

I conducted a formal hearing on February 21, 2006 in Harrisburg, Pennsylvania, at which the parties were given a full and fair opportunity to present evidence and argument. No appearance was entered for the Director, OWCP. CX 1-26 and EX 1-42 were admitted into the record without objection. The record remained open post hearing for the submission of closing briefs. Claimant filed a closing brief on May 1, 2006; Employer filed its brief on May 22, 2006; Claimant then filed a reply brief on June 9, 2006.

I. STIPULATIONS

The parties stipulate and I find:

A. The Claimant is covered by the Act which applies to this proceeding.

B. The Claimant and the Employer were in an employee-employer relationship at the relevant times.

C. The Claimant sustained an injury on January 22, 2000.

D. The injury occurred in the course and scope of the Claimant's employment.

E. The Claimant provided timely notice of his injury to the employer.

[1] The following references will be used: "TR" for the official hearing transcript; "CX" for a Claimant's exhibit; "DX" for a Director's exhibit; and, "EX" for an Employer's exhibit.

F. The Claimant's claim for compensation was timely filed and is dated September 26, 2000.

G. The Employer filed timely Notice of Controversion.

H. The Employer filed Notices of Controversion on various dates.

I. The parties haves stipulated that medical benefits, under section 7 of the LHWCA, were paid. They have not, however, stipulated the amount but have noted that benefits were not paid for psychiatric treatment.

J. The parties have stipulated that the Employer paid compensation benefits to the Claimant from January 22, 2000 through August 5, 2004. EX 12 indicates that the Claimant received temporary total disability benefits from the Employer, voluntarily and without an award, at a rate of $251.62 per week from January 22, 2000 through August 5, 2004. The Employer claims, however, that payments from February 6, 2004 through August 5, 2004 constitute overpayment.

K. The Claimant's average weekly wage ("AWW") is $ 376.97 and his compensation rate is $251.62.

II. ISSUES

A. Whether the Claimant continues to suffer from a disability arising out of a work-related injury incurred on January 22, 2000?

B. Whether the Claimant is permanently and totally disabled due to that work-related injury?

C. Whether the Claimant's disability benefits, which were terminated by the Employer as of August 6, 2004, should be reinstated to the time that the Claimant is adjudicated as permanently and totally disabled and continuing through the duration of that disability?

D. Whether the Employer is entitled to relief under Section 8(f) of the LHWCA?

III. FINDINGS OF FACT

A. BACKGROUND

The Claimant is 65 years old. (TR 26). He has an eighth grade education. (TR 44). He worked for the Employer at the Community Club at Fort Indiantown Gap as a bartender. He began working in this capacity in 1986 or 1988. (EX 36 at 13). The Community Club served local military personnel as well as members of the community. His primary duties were to serve beer and some mixed drinks to customers and to collect cash payment. (TR 49).

The Claimant had held two prior bartending positions that entailed similar responsibilities. (TR 46-49). He began the first such position in 1972 at Penn National Race Track and held that position until 1983 when he took a similar job at the Village Inn. (EX 36 at 11-12). Prior to those positions, the Claimant performed various odd jobs. (EX 36 at 11). He has had only one job interview in his life, in the 1970's. (TR 53).

The Claimant suffered a workplace right shoulder injury in 1997. (TR 28). He had two surgeries in six months as a result of that injury. (TR 29). He also had brain surgery in 1967. (TR 36-37). He also reported carpal tunnel and arthritis in his left hand and fingers (TR 39-40), arthritis in his knees (TR 43) and a joint problem with his hip (TR 43). He had surgery on his hands in the 1970's. (TR 95). He also reported poor hearing and wears eyeglasses. (TR 43-44).

On January 22, 2000, while working as a bartender at the Community Club, the Claimant tripped on floor slats while carrying two cases of beer. As a result, his right shoulder and head hit the wall. (TR 31). After consultation with several doctors, the Claimant had surgery, performed by Dr. Mark Holencik, on July 14, 2000. (TR 33). He participated in rehabilitation until Dr. Holencik ordered it to cease due to a rotator cuff injury. (TR 34-35).

The Claimant was eventually fired from his job at the Community Club. (EX 36 at 18). Documentation from the Employer, dated March 27, 2000, states that he was terminated for not following money handling procedures. (EX 5). The Claimant could not account for the particular circumstances surrounding his termination. (EX 36 at 18).

B. CLAIMANT'S MEDICAL EVIDENCE

Claimant's Testimony

The Claimant testified that he has been in constant pain since his January 22, 2000 injury. (EX 36 at 45). He takes Motrin for the pain but stated that it has been ineffective. (TR 82-83). He has suffered anxiety attacks and depression. (EX 36 at 22-23). He can move his lower right arm from the elbow down but cannot move his right arm away from his body. (TR 67-68). When using his right hand, he keeps his arm close to his body. (TR 79). Other than arthritis, he has no restriction with his left arm. (TR 86).

He is able to drive, but typically does not drive more than twenty miles at a time. (EX 36 at 24). Instead, he relies heavily on others for transportation. (EX 36 at 24). When driving, he does not use his right arm to steer but instead relies exclusively on his left. (TR 81-28). The Claimant also testified as to the particularized manner in which he puts on a seatbelt. (TR 76).

He has been relatively inactive since the accident. (EX 36 at 23). He has not worked since leaving Fort Indiantown Gap, nor has he applied for any other employment. (EX 36 at 45). He stated that he does not feel comfortable attempting another job due to his persistent pain. (EX 36 at 45).

Physician Opinions

Dr. Thomas Pietras offered a March 20, 2000 report of a shoulder X-ray taken March 17, 2000. He reported a history of shoulder pain. Dr. Pietras stated that the X-ray did not evidence fracture or dislocation. Instead, the X-ray showed subtle calcification which could relate to calcific tendonitis and findings suggestive of acromioclavicular ("AC") separation. (CX 2).[2]

Dr. Michael Woods offered examination reports dated March 20, 2000 (CX 3), April 11, 2000 (CX 4), and May 1, 2000 (CX 6), respectively.

In his March 20, 2000 report, Dr. Woods noted the Claimant's persistent complaints of pain, weakness, and limited motion associated with his right shoulder. His examination revealed limited shoulder range of motion with pain beyond that range. He noted pain in the anterior lateral shoulder and upper trapezius. He diagnosed a right rotator cuff strain. With respect to work status, Dr. Woods imposed a light duty restriction. (CX 3).

In his April 11, 2000 report, Dr. Woods reported continued pain and a more significant limitation in shoulder range of motion. On examination, Dr. Woods reiterated the Claimant's limited shoulder range of motion. He diagnosed right rotator cuff strain, with a possible tear. He referred the Claimant to Dr. Holencik for an MRI. With respect to work status, he continued the light duty restriction and limited lifting of the right upper extremity to ten pounds and no lifting above the shoulder. (CX 4).

In his May 1, 2000 report, Dr. Woods found continued shoulder pain that is worse with overhead activity and worse when sleeping. He also reported that an April 25, 2000 MRI showed artifact from prior surgery and an apparent recurrent rotator cuff tear. On examination, he again noted limited active right shoulder range of motion. He again diagnosed a recurrent right rotator cuff tear. He continued the work status restriction from the prior examinations. (CX 6).

Three letters written by Dr. Woods are also admitted into the record. Those letters are dated April 25, 2000 (CX 5), May 24, 2000 (CX 7), and July 5, 2000 (CX 9), respectively. The letters principally reiterate the work restrictions Dr. Woods stated in the examination reports. In the May 24, 2000 letter, Dr. Woods also explicitly opined that the Claimant is not totally disabled. (CX 7). In the July 5, 2000 letter, Dr. Woods described the Claimant's condition as a "partial disability." (CX 9). He further stated that these restrictions resulted from his January 22, 2000 injury. (CX 9).

Dr. Mark P. Holencik, D.O., who is Board-certified in Osteopathic Surgery, treated the Claimant for the shoulder injury that resulted from his January 22, 2000 incident. This treatment included surgery performed on July 14, 2000. (CX 10). His treatment records, dated June 12, 2000-January 9, 2002 (CX 8, 10-20) document treatment before, during, and after that surgery.

Prior to the surgery, Dr. Holencik reported that the Claimant experienced pain upon shoulder abduction and external rotation; additionally, radiographs revealed a small cuff tear

[2] The Employer has also offered this exhibit as EX 20.

superimposed on an ancient repair. (CX 8). He noted, on June 12, 2000, that the Claimant was not responding to the physical therapy Dr. Woods had prescribed for his injury. (CX 8). He believed surgery would be beneficial to explore the source of continued pain and to repair the problem. (CX 8).[3]

During surgery, Dr. Holencik examined the Claimant's right shoulder under anesthesia. (CX 10). This examination demonstrated a frank anterior instability with abduction and external rotation. (CX 10). During the surgery, Dr. Holencik resected the clavicle after noticing bony contact with the AC joint. (CX 10). He reported that the Claimant tolerated the procedure well. (CX 10).

After the surgery, the Claimant's right arm was placed in an immobilizer, he was ordered not to work, and began a rehabilitation process. (CX 11-13). The rehabilitation progressed relatively well at first (CX 14-15) but then resulted in a full thickness tear of the supraspinatus tendon, as shown by an MRI. (CX 17). This resulted in severe pain while performing rotator cuff exercises. (CX 17). Upon this finding, Dr. Holencik opined that another surgery would not guarantee improvement and the Claimant was disinclined to submit to further surgery, given his multiple past surgeries and persistent pain. Absent a successful subsequent surgery, Dr. Holencik advised that the Claimant should not return to work. (CX 17).

In his report dated May 21, 2001, Dr. Holencik explained in some detail why any work was impossible for the Claimant, due to his rotator cuff injury and associated pain. (CX 18). His upper extremity condition made any sort of gainful employment, "even pencil pushing or answering phones," impossible. Dr. Holencik reiterated that the Claimant experiences pain at all times, particularly with repetitive or elevated activity. He concluded that the Claimant would be unable to work for the foreseeable future. (CX 18). Dr. Holencik reiterated these opinions in his reports dated October 12, 2001 (CX 19) and January 9, 2002.[4]

Dr. Holencik again examined the Claimant on October 27, 2004 and offered a report that summarized his findings. (CX 24).[5] He diagnosed the Claimant with a complex rotator cuff tear in the right shoulder, ankylosis and pain in the right shoulder, and an "essentially useless right non-dominant upper extremity." (CX 24 at 7). Based on this condition, and the Claimant's IQ of 72 and his fourth-grade mathematics capabilities, Dr. Holencik concluded that the Claimant should not engage in any employment. (CX 24 at 6-7). He specifically disagreed with Dr. Mauer's opinion that the Claimant could function in a job that involved lifting or as a parking lot attendant. With respect to the former, Dr. Holencik stated that the Claimant's physical limitations precluded such employment. (CX 24 at 2-3). With respect to the latter, Dr. Holencik stated that the combination of the Claimant's persistent pain, IQ, and skill level left him unable to function in that capacity. He elaborated that, physically, the Claimant would be unable to maintain a constant position. (CX 24 at 6). Dr. Holencik also stated that the totality of his situation left the Claimant unable to deal with the cognitive dissonance to begin a new job. (CX

[3] For further discussion of Dr. Holencik's concerns that led to surgery see discussion of his deposition testimony, *infra*, "Employer's Medical Evidence."
[4] In the latter, Dr. Holencik added that the Claimant is experiencing headaches and spasms as a result of the accident. (CX 20).
[5] The Employer also offered this reports as EX 23 at 2-8.

24 at 6).

On February 3, 2005, Dr. Holencik documented an examination and treatment for severe and disabling right shoulder pain. (CX 25).[6]

Dr. Robert J. Mauer, M.D., whose specific credentials are not in the record, examined the Claimant and issued a medical report dated September 24, 2002. (CX 21). He noted full range of motion of his neck and all joints of the left upper extremity but restrictions of his right shoulder. He also referred to the Claimant's persistent pain. Dr. Mauer diagnosed a right shoulder rotator cuff arthropathy with degenerative changes in the right shoulder secondary to chronic rotator cuff tear. He stated that the Claimant could be working in a capacity that requires lifting of up to twenty-five pounds. He recommended no lifting with the right shoulder. (CX 21).[7]

Dr. Mauer also viewed X-rays of the Claimant's shoulder and reported moderate degenerative changes consistent with recurrent rotator cuff tear. He also reported arthritic changes. (CX 21).

Dr. Denise F. Montisano, M.D., who treated the Claimant since 1995, submitted two letters on the Claimant's behalf. The first, addressed to Senator Rick Santorum, is dated January 13, 2004 (CX 22); the second, addressed to Mr. Scott Jordan, is dated August 27, 2004 (CX 23). She stated that further surgery would be necessary to completely restore the Claimant's rotator cuff but that he is hesitant to pursue this course. (CX 22). She also stated that he is in chronic pain, unable to lift his arm above ninety degrees, and has experienced anxiety and depression due to his condition. (CX 22). Her letter to Senator Santorum expressed doubt over his ability to return to work as a bartender. (CX 22).

In her letter to Mr. Jordan, Dr. Montisano stated that the Claimant has developed panic attacks and an anxiety disorder for which he takes medication. (CX 23). She reiterated her belief that this psychological condition is related to his chronic pain. (CX 23). Dr. Montisano also noted that when his condition is not treated, he develops hypertension. (CX 23). She concluded that because of his persistent shoulder pain, his anxiety, and his inability to successfully complete rehabilitation, the Claimant is unable to continue gainful employment as a bartender. (CX 23).

Other Evidence

Physician Assistant Deb A. Martek examined the Claimant on January 27, 2000 for complaints associated with his right shoulder. She reported that he was in no acute pain but that his range of motion was decreased and that he experienced pain. She referred him to a physician started him on medication and treatment. (CX 1).

[6] The Employer also offered this document as EX 23 at 9-10. Dr. Holencik was deposed and the transcript of his deposition was submitted by the Employer. (EX 42). For a summary of that testimony, see *infra* "Employers Medical Evidence."

[7] The Employer also submitted this exhibit as EX 21 at 5-7 & 9.

C. EMPLOYER'S MEDICAL EVIDENCE

Physician Opinions

The Employer submitted records of Dr. Montisano's treatment of the Claimant, dated September 15, 1995-June 24, 2005. (EX 14). This treatment covered a variety of ailments, including internal congestion, back pain, neck pain, shoulder pain, headache, urinary symptoms, sore throat, insomnia, and depression and anxiety. She noted an arthritic condition in her first examination of the Claimant. (EX 14 at 2). She treated him in connection with a workplace injury in 1997 in which she noted muscle spasms, shoulder strain, and pain. (EX 14 at 4).

Records for treatment following his January 22, 2000 incident document shoulder pain and a light duty work restriction. (EX 14 at 13-14). In 2001-02, Dr. Montisano noted arm pain, an inability to sleep, lower back pain, and shoulder pain. (EX 14 at 15-24). On June 7, 2002, Dr. Montisano commented that "[t]here's definitely nothing more that can be done with his shoulder." (EX 14 at 24). Thereafter, she began more extensive treatment for the Claimant's anxiety and depression. (EX 14 at 25-38). She later reported that he was experiencing panic attacks. (EX 14 at 48-50).

On November 19, 2004, Dr. Montisano noted that she agreed with Dr. Holencik's assessment that the Claimant is incapable of gainful employment. (EX 14 at 54). Her last examination of the Claimant contained in these records, dated June 9, 2005, noted the Claimant's shoulder pain, an inability to abduct his right arm completely, and clear discomfort but indicated no acute distress. (EX 14 at 60).

Dr. Peter Van Giesen, M.D. evaluated the Claimant on April 5, 2002 because of his persistent shoulder pain. (EX 18). With respect to right shoulder movement, he noted 50 degrees of flaxion, 20 degrees of external rotation, 20 degrees of internal rotation, 75 degrees of abduction, and 20 degrees of extension, with pain at the extremes of all motions. (EX 18 at 2). He diagnosed right shoulder pain, rotator cuff tendonitis and burmitis, and impingement syndrome. (EX 18 at 3). In a letter dated April 24, 2002, Dr. Van Giesen stated that the Claimant has not achieved maximum medical improvement and that further surgery and rehabilitation may be required. (EX 18 at 7). If such a course were pursued, Dr. Van Giesen continued, the Claimant could return to work six months after its completion. (EX 18 at 7). Dr. Van Giesen also indicated the need for additional information to determine the Claimant's exact work capacity. (EX 18 at 7).

The Employer submitted the results of an MRI of the right shoulder dated February 18, 1998, in which Dr. James W. Warren, M.D. diagnosed a partial tear of the rotator cuff tendon. (EX 19).

The Employer submitted four examination reports of Dr. Mauer, which cover January 29, 1999-September 12, 2003. (EX 21). The first examination report, dated January 29, 1999, considered the Claimant's condition after his 1997 workplace injury. (EX 21 at 1-4). In that report, Dr. Mauer stated that the Claimant had full age-appropriate range of motion of all joints. (EX 21 at 2). He also stated that the Claimant "may have improved more than he will admit"

and that he could return to work activity, lifting up to fifty pounds. (EX 21 at 3). Dr. Mauer further opined that the Claimant would always be subject to some lifting restrictions in the workplace. (EX 21 at 3).

After the Claimant's 2000 injury, Dr. Mauer certified, in a document dated September 9, 2002, that the Claimant could return to work with a light duty restriction, including no work with the right arm at or above shoulder level and no lifting more than 25 pounds. (EX 21 at 8). He also issued three examination reports subsequent to the 2000 injury. The first, dated September 24, 2002, is detailed above as CX 21. (EX 21 at 5-7 & 9). He next issued an examination report dated July 11, 2003. (EX 21 at 10). In that report, he noted some limitation of motion in the right shoulder but speculated that some of it may have been self-induced. (EX 21 at 10). He diagnosed right shoulder tendonitis and recommended work within the restriction described above. (EX 21 at 10). Dr. Mauer also indicated that the Claimant reached maximum medical improvement. (EX 21 at 14).

Dr. Mauer issued another examination report dated September 12, 2003. (EX 21 at 15). He reported that the Claimant's range of motion had improved since his last visit but that he still had limited extension. (EX 21 at 15). He recommended work with a lifting restriction with the right upper extremity of forty pounds or less but no restriction with the left. (EX 21 at 15).

Dr. Perry A. Eagle, M.D., who is Board-certified in orthopedic surgery, examined the Claimant on August 30, 2005 and reviewed medical records. He summarized his findings and conclusions in a report dated August 30, 2005. (EX 30). Dr. Eagle's examination revealed limited range of motion in the right shoulder and limited internal and external rotation. (EX 30 at 2). Pain exists beyond the limits of these motions. (EX 30 at 2-3). He also stated that the Claimant was in a post-operative state of having had multiple surgeries on the right shoulder. (EX 30 at 3). As a result, the Claimant has persistent pain and fibrous ankylosis of the shoulder with significant restriction of motion. (EX 30 at 3). Dr. Eagle opined that the Claimant has reached maximum medical improvement as far as the right shoulder is concerned and is capable of performing work activities with some restrictions. (EX 30 at 3). To that end, Dr. Eagle continued, he would have unlimited use of his left upper extremity and would have use of his hand with appropriate wrist and elbow motions in his right upper extremity. (EX 30 at 3-4). Additionally, he should refrain from activities that require motion of the right shoulder. (EX 30 at 4). Dr. Eagle imposed a ten pound limit on lifting and carrying with the right upper extremity but noted no lifting restriction with the left extremity. (EX 30 at 4).

Dr. Eagle was deposed on February 1, 2006. The Employer has submitted the transcript of his deposition testimony. (EX 40). Dr. Eagle extensively reiterated the findings and conclusions contained in his report. He testified that he reviewed a surveillance video, identified as EX 38, in which the Claimant performed various tasks. (EX 40 at 16). Based on this viewing, Dr. Eagle opined that the Claimant could drive a vehicle with an automatic transmission. (EX 40 at 17). Dr. Eagle also stated that the Claimant is physically capable of performing any of the jobs described in EX 34. (EX 40 at 18). Dr. Eagle also stated that it is possible that the Claimant may have recovered more completely from the January, 2000 injury if not for his previous surgeries. (EX 40 at 20-21).

Dr. Lawrence Altaker, M.D., evaluated the Claimant on September 16, 2005 "to determine whether or not there was any work related psychiatric condition or psychiatric reason why he was not able to work." (EX 31 at 1). Dr. Altaker also reviewed voluminous medical records. (EX 31 at 1). He summarized his conclusions in a report dated October 14, 2005. (EX 31). Based on his review of the records, Dr. Altaker observed that the Claimant was first diagnosed with anxiety in February, 2002. (EX 31 at 2). He also stated that the Claimant described to him symptoms of both anxiety and depression. (EX 31 at 2). The Claimant seemed to relate these symptoms to his finances, physical condition, and inactivity. (EX 31 at 2). Dr. Altaker concluded that the Claimant has a work-related psychiatric/psychological condition, namely panic attacks. (EX 31 at 4). He further opined that, from a psychiatric perspective, the Claimant is capable of working, though he noted limitation because his education did not exceed ninth grade. (EX 31 at 4).[8]

In addition to Dr. Holencik's reports detailed above as CX 24 & 25, the Employer also submitted an examination report he authored dated June 14, 2005. (EX 23 at 11-12). In that report, Dr. Holencik diagnosed a cuff tear arthropathy with chronic pain and deltoid atrophy. He also described the movement limitations of the Claimant's right shoulder and stated that the shoulder would be symptomatic for the foreseeable future. (EX 23 at 11). Dr. Holencik also authored a letter dated June 28, 2005 (EX 23 at 13) in which he reiterated the Claimant's shoulder limitations and ordered new treatments for pain control and improved abduction. (EX 23 at 13).

Other Evidence

The Employer also submitted the Claimant's treatment records from Arlington Orthopedics, which include statements from Dr. Rex A. Herbert, D.O., Dr. Robert L. Green, D.O., Dr. Holencik, and Dr. Woods. (EX 15). The records span the timeframe of January 5, 1998-September 24, 2002.[9]

These records document treatment for his 1997 workplace injury. As a result of that injury, Dr. Green observed a painful range of motion with the right shoulder, especially with abduction and external rotation, tendonitis at the AC joint, and weakness of the rotator cuff. (EX 15 at 1). Based on an MRI, Dr. Herbert found a possible tear of the rotator cuff in a report dated February 27, 1998. (EX 15 at 4). The records document his right shoulder surgery, performed on March 4, 1998 (EX 15 at 5) and a diagnostic and operative arthroscopy on October 5, 1998 (EX 15 at 15). The records also document the Claimant's rehabilitation and return to work, following the 1997 injury. (EX 15 at 9-17). On July 9, 1999, Dr. Herbert reported that the Claimant reached maximum medical improvement from the 1997 injury; he still had mild functional deficit with his arm. (EX 15 at 27). Dr. Herbert allowed him to return to work, subject to a permanent restriction on heavy lifting. (EX 15 at 27).

The records also document treatment following his January 22, 2000 injury. (EX 15 at

[8] Dr. Altaker also observed that the Claimant would be limited in the workplace due to his physical condition. (EX 31 at 4).

[9] The records from Arlington Orthopedics include many documents admitted, *supra*, as Claimant's exhibits, including CX 3-9 and CX 11-20.

28-97). A shoulder X-ray taken on March 17, 2000 revealed possible calcification tendonitis and AC separation. (EX 15 at 28). He was diagnosed with a right rotator cuff strain on March 20, 2000. (EX 15 at 29). The records document a plan of rehabilitation after the injury. (EX 15 at 35-43). After engaging in that rehabilitation, the Claimant continued to experience pain and limited range of motion. (EX 15 at 44). An MRI conducted April 25, 2000 revealed findings consistent with rotator cuff repair and evidence of a small tear. (EX 15 at 45).

In addition to the diagnoses of Drs. Holencik and Woods, as detailed above, the records also document the Claimant's rehabilitation after his July 14, 2000 surgery. (*see e.g.* EX 15 at 63). A report of a February 28, 2001 MRI indicated at least a partial, and possibly a full thickness tear, of the rotator cuff. (EX 15 at 86-87). A November 19, 2001 MRI revealed a partial thickness tear of the anterior portion of the supraspinatus tendon. (EX 15 at 93). On March 5, 2002, Dr. Holencik stated that the Claimant is "totally disabled" and indicated that "no marked improvement for the future is foreseeable." (EX 15 at 96).

The Employer submitted the transcript of Dr. Holencik's deposition. (EX 42). In his deposition, Dr. Holencik stated that he believed the Claimant's initial (2000) injury to be an anteriorly dislocated shoulder that resulted from his accident. (EX 42 at 18). He performed surgery after the Claimant did not respond to physical therapy for that injury. (EX 42 at 18). According to Dr. Holencik, the Claimant then suffered a retear of his rotator cuff during his rehabilitation. (EX 42 at 19). Dr. Holencik testified that, based upon his diagnosis detailed above, he never released the Claimant to any type of work. (EX 42 at 20). He reiterated that the Claimant's failure to recover from the January 22, 2000 injury was due to a rupture to his rotator cuff that occurred during rehabilitation. (EX 42 at 21). He stated that for the Claimant to return to work, he would be subject to the restriction of virtually no use of his right upper extremity. (EX 42 at 24). Any movement of the right arm would cause pain. (EX 42 at 43-44). Dr. Holencik also explained how persistent pain leads to general reflex inhibition, clumsiness, and weakness. (EX 42 at 44-45). This point furthered his conclusion that the Claimant should not return to any type of work.

Referring to an office note dated January 24, 2006, Dr. Holencik testified that the Claimant would be precluded from exclusive use of his left arm because the combination of several finger injuries and arthritis has left him unable to clench a fist. (EX 42 at 25). He conceded that this note represented the first time that he recorded such an observation. (EX 42 at 26).

Dr. Holencik also stated that he observed the Claimant's high degree of anxiety over his condition, although he has not seen any corresponding psychiatric or psychological documentation attesting to it. (EX 42 at 46-47).

The Employer submitted hospital records from Community General Orthopedics Hospital. (EX 16). The records indicate treatment from December 8, 1989-December 1, 2002. The Claimant was treated at the hospital for chest pain in 1992. (EX 16 at 4-11). Arthritis was also observed at that time. (EX 16 at 5). He was treated for a torn and sprained right rotator cuff in 1998. (EX 16 at 12). The records contain documentation of the shoulder surgery performed by Dr. Herbert in March, 1998. (EX 16 at 11-14). An October 5, 1998 surgery performed by Dr.

Green is also documented. (EX 16 at 17-18). The records also detail the July 14, 2000 surgery performed by Dr. Holencik. (EX 16 at 20-23).[10] The Claimant returned to the hospital after the surgery with complaints of right shoulder pain. (EX 16 at 35). He was also treated there for anxiety. (EX 16 at 36-37).

The Employer also submitted the hospital records from the Emergency Medical Center in Hershey, Pennsylvania. (EX 17). Records from November 3, 1993 through November 27, 2001 are included. During that timeframe, the Claimant was treated at that hospital for an array of maladies, including eye injuries, finger injuries, sore throat, dizziness, light-headedness, neck pain, and insomnia. He was also treated there for a 1996 workplace injury that resulted in lower back pain. (EX 17 at 12-13). He also received medical attention there for pain following his 1997 shoulder injury. (EX 17 at 24).

D. VOCATIONAL EVIDENCE

Mr. Jeff Hudak, Exercise Physiologist, and Mr. Edward M. Velasquez, M.P.T., issued a Functional Capacity Evaluation Report dated March 7, 2003. (EX 22). The study was designed to provide "objective quantification of one's safe functional abilities." (EX 22 at 1). The report noted that the Claimant offered an inconsistent effort, and, as such, its conclusions may not accurately reflect his capabilities. The report stated that the Claimant has the ability to occasionally squat, crouch, bend forward, and climb stairs. It also stated that he may be expected to perform at least at the sedentary level. Because of his inconsistent effort, however, the report did not contain a job analysis. (EX 22 at 2).

Ms. Barbara K. Byers, Certified Rehabilitation Counselor, conducted a vocational evaluation and prepared a labor market survey report regarding the Claimant. (EX 27). Her report, dated January 21, 2004, was offered into evidence by the Employer. Ms. Byers summarized the Claimant's work, educational, and medical history. (EX 27 at 2-4). She also referenced the restriction imposed by Dr. Mauer of no lifting above the right shoulder, no lifting above 25 pounds with the right hand, and no lifting above fifty pounds total. (EX 27 at 4). Ms. Byers conducted vocational testing. On the Wide Range Achievement Test Revision 3, the Claimant achieved a grade score of 4.3 in reading and 6.3 in math. (EX 27 at 4). On the Shipley Institute of Living Scale, the Claimant scored an IQ of 72. (EX 27 at 4). Ms. Byers concluded that the Claimant qualifies for a variety of positions available in the Harrisburg area. (EX 27 at 4). She listed specific available positions, including bartender, assembler, unarmed security guard, and parking cashier. (EX 27 at 5-6). Ms. Byers forwarded the list of available positions and contact information to the Claimant. (EX 24 & 25).

Ms. Byers updated the labor market survey on October 17, 2005 (EX 32), November 17, 2005 (EX 33), and February 6, 2006 (EX 39). The updated surveys listed jobs for which the Claimant was qualified, which were currently open. The October update included positions of security guard, bartender, sales associate, cashier, textile handler, tray assembler, and parking cashier. (EX 32). The November update included positions of parking cashier, order taker, security guard, and tray assembler. (EX 33). The February update included the positions of cashier, traffic control officer, appointment setter, sales associate, parking cashier, unarmed

[10] EX 16 at 21-23 is identical to CX 10.

security guard, and customer services representative (EX 39).

On January 1, 2004, Dr. Mauer approved all of the positions listed on the first labor survey report for the Claimant. (EX 26). On December 11, 2005, Dr. Eagle approved the positions of appointment setter, order clerk, tray assembler, linen attendant, bartender, sales associate, cashier, unarmed security guard, and parking cashier for the Claimant. (EX 34). On December 20, 2005, Dr. Altaker approved the positions of parking cashier, unarmed security guard, order clerk, and appointment setter for the Claimant. (EX 35). He did not approve the positions of cashier, sales associate, bartender, linen attendant, or tray assembler because of their physical requirements. (EX 35).

Ms. Byers also testified at the hearing. She stated that she devised the list of available jobs for the Claimant by presenting his work and education history and medical restrictions, as assigned by Dr. Mauer, to prospective employers. (TR 120). She also testified that the updated labor market surveys considered more restrictive physical limitations for the Claimant, namely a ten pound restriction on right-side lifting. (TR 124). This change eliminated all but one of the bartender positions. (TR 124).

Ms. Byers opined that, based on her review of the records and interview with the Claimant, the Claimant is qualified for several jobs that have been available to him, including cashier, appointment setter, and unarmed security guard. She based this conclusion on the Claimant's experience with customer service and, given his limitations, the physical requirements of the positions. (TR 132). She also estimated that the Claimant's wage earning capacity is $9.00-$10.00 per hour and $360.00-$400.00 per week. (TR 133). Ms. Byers also opined that she did not believe the Claimant's accounts of persistent pain amounted to workplace restriction. (TR 134-35).

E. SURVEILLANCE EVIDENCE

The Employer submitted videos documenting surveillance on the Claimant on August 4, 2005 (EX 37) and October 26, 2005 (EX 38). The first video shows the Claimant performing several daily tasks. On several occasions, he entered his car by unlocking the door with his right hand and opening the door with his left. He is shown pumping gas, which he did with his left hand. He returned the gas cap with his right. The video shows the Claimant carrying groceries and then lifting them into the trunk of a car with his left arm. He is shown applying the seat belt of his car on several occasions, some of which with his left arm and some of which with his right. When using his right arm to apply the seat belt, he reached across his body to grasp the seat belt with his right hand. (EX 37).

The second video reveals much of the same. Again, the Claimant is seen pumping gas, which he does with his left hand. He returned the gas cap with his right. The video shows him opening several doors with his left hand. He is seen lifting bags with his left hand. The video also shows him applying his seat belt on several occasions, again varying between his left and rand hand. (EX 38).

IV. CONCLUSIONS OF LAW

To receive compensation under the Act, a claimant must establish that he or she was (1) an employee of a nonappropriated fund instrumentality; and (2) was injured in the course of employment. 5 U.S.C. § 8171;[11] *accord Johnson v. United States*, 600 F.2d 1218, 1222 (6th Cir. 1979).[12]

It is well established that, in arriving at his or her decision, an Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw his or her own inferences and conclusions from the evidence. *Quinones v. H.B. Zachery, Inc.* 32 BRBS 6 (1998). Accordingly, the Administrative Law Judge's credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *Id.; Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

It has been consistently held that the LHWCA must be construed liberally in favor of claimants. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). Because the provisions of LHWCA apply to the Act, that mandate shall apply to this action as well.

A. JURISDICTION[13]

A party seeking benefits under the Act has the burden of establishing jurisdiction. *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267 (1994), *aff'g* 990 F.2d 730 (3d Cir. 1993).[14] The parties have not contested jurisdiction in this case. Moreover, the Claimant has established that he was employed at the Community Club at Fort Indiantown Gap. (TR 51). Accordingly, I find jurisdiction proper in this case.

B. RESPONSIBLE EMPLOYER

For a claim to be compensable, the injury must arise out of and in the course of employment. 33 U.S.C. § 902(2). Therefore, an employer-employee relationship must exist at the time of the injury. *American Stevedoring Limited v. Marinelli*, 248 F.3d 54 (2d Cir. 2001). 5 U.S.C. § 8171(a) states that an "employee" under the Act, as described by 5 U.S.C. § 2105(c), includes:

> An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy Exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction

[11] With respect to the second prong, the Act refers to 33 U.S.C. § 902(2).
[12] *Johnson* arose in the contexts of an employee's death and, therefore, substituted "injury" with "death."
[13] The law of the Circuit in which injury occurs is applicable. *Roberts v. Custom Ship Interiors*, 35 BRBS 65 (May 15, 2001)(BRB No. 00-832), 300 F.3d 510 (4th Cir. 2002) *cert. den*., 123 S.Ct. 1255 (2003). In this case, because the injury occurred in Pennsylvania, Third Circuit law applies.
[14] The Board has distinguished "jurisdiction" from "coverage." *See Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 90 (1989); *accord Munguia v. Chevron USA, Inc.*, 999 F.2d 808 (5th Cir. 1993), *cert. den.* 511 U.S. 1086 (1994); *Perkins v. Marine Terminals Corp.*, 773 F.2d 1097, 1100 (9th Cir. 1982) *rev'g* 12 BRBS 219 (1980).

of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces[.]

The term "employer" under the Act includes the nonappropriated fund instrumentalities described by this provision. 5 U.S.C. § 8171(b).

In this case, the parties have stipulated that the Claimant and Employer were in an employee-employer relationship at the times relevant to this litigation. Therefore, I find that the Employer is properly designated as the responsible employer.

C. TIMELINESS OF NOTICE

33 U.S.C. § 912 sets out the requirements for timely notice to an employer of injury or death. Generally, an employee has thirty days to provide notice, and the clock starts to run when reasonable diligence would have disclosed the relationship between his injury and his employment. § 912(a); 20 C.F.R. § 702.212(a). Section 920(b) establishes a presumption that sufficient notice of the claim has been given. An employer may rebut the presumption by presenting substantial evidence that it did not have knowledge of the employee's work-related injury or death. *See, Blanding v. Director, OWCP [Oldham Shipping]*, 186 F.3d 232 (2d Cir. 1999) *citing Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir. 1982). Failure to give timely notice may bar a claim.

Where one injury arises out of an accident that has been reported, the claimant does not have to give separate notice of other injuries resulting from the same incident. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988)[15]

In this case, the parties have stipulated that the Claimant provided timely notice of his injury to the Employer. At the hearing, this Court and respective counsel discussed this stipulation in the context of the January 22, 2000 injury. Counsel reaffirmed the stipulation during that discussion. (TR 6-7). Subsequently, Employer's counsel stated that the Employer was not aware of the injury to the Claimant that took place during rehabilitation.

Nevertheless, I find that the Claimant provided timely notice of his injury to the Employer. Specifically, the parties have stipulated, and I find, that the Claimant provided timely notice of the January 22, 2000 injury. Moreover, consistent with *Thompson*, no new notice was required after the injury incurred during rehabilitation. Therefore, the Claimant has met the requirement of providing timely notice of injury.

D. TIMELINESS OF CLAIM

As a threshold matter, I must consider whether the Claimant timely filed his claim. A worker must file an LHWCA claim within one year after the injury. 33 U.S.C.A. § 913(a); 20

[15] In *Thompson*, the Claimant injured his ankle in at work, for which he provided timely notice to his employer. During subsequent treatment for that injury, he injured his back. The claimant did not provide separate notice for the back injury. The Board held, contrary to the employer's contention, that because the ankle injury was timely noticed, no separate notice was required for the back injury. *Thompson*, 21 BRBS at 95-96.

C.F.R. § 702.221. Failure to file a claim within the year may bar any right to compensation. Save certain exceptions provided in the Regulations, the right to compensation is barred unless a claim is filed within one year of the injury. 20 C.F.R. § 702.221. The employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. § 920(b); *Fortier v. Gen. Dynamics Corp.*, 15 BRBS 4 (1982), *appeal dismissed sub nom. Ins. Co. of N. Am. v. Benefits Review Bd.*, 729 F.2d 1441 (2d. Cir. 1983).

In this case, the parties have stipulated, and I find, that the claim was timely filed.

E. INJURY

Section 2(2) of the LHWCA defines an "injury" as an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. 33 U.S.C. § 902(2)*; see U.S. Indus./Fed. Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608 (1982), *rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980).[16]

Furthermore, if an employee suffering from a compensable injury sustains an additional injury that naturally results from an additional injury, the two injuries "fuse into one compensable injury." *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454, 457 (9th Cir. 1954). In such an instance, the second injury must be the direct and natural result of the compensable primary injury and not a worsening of the initial injury by an independent cause. *Miss. Coast Marine v. Bosarge*, 637 F.2d 994, 1000 (5th Cir. 1981).

The Claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish his prima facie case.[17] *Bolden v. G.A.T.X. Terminals Corp*., 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Md.*, 23 BRBS 157 (1990); *U.S. Indus./Fed. Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 616 (1982); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11 (1998). The claimant must establish each element of his prima facie case by affirmative proof. *Kooley v. Marine Indus. Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Once the prima facie case is established, a presumption is created under Section 20(a) of the LHWCA that the employee's injury arose out of his or her employment.[18] 33 U.S.C. § 920(a). Moreover, Section 20(d) of the Act favors the claimant with a presumption that the injury suffered was not occasioned by the willful intention of the injured employee to injure or

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[16] 5 U.S.C. § 8171(a) specifically incorporates the LHWCA's definition of "injury," as stated in 33 U.S.C. § 902(2) in the Act.

[17] Or, as the Board stated in *Kier v. Bethlehem Steel Corp*., 16 BRBS 128 (1984), that the claimant has the burden of establishing: (1) he or she sustained physical harm or pain; and, (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. But, a connection between the work and the harm need not be established at this stage. *Accord, Kelaita*, 13 BRBS at 331.

[18] This presumption applies only to the issue of whether an injury arises in the course of employment and, thus, is work-related; not to the issues of the nature and extent of disability. *Carlisle v. Bunge Corp*., 33 BRBS 133 (1999) *citing Jones v. Genco, Inc*., 21 BRBS 12 (1998).

kill himself or another. *Green v. Atl. & Gulf Stevedores, Inc*., 18 BRBS 116 (1986).

Once the presumption is invoked, the party opposing entitlement must present specific and comprehensive medical evidence proving the absence of or severing the (presumed) causal connection between such harm and employment or working conditions. *Manship v. Norfolk & W. Ry. Co.,* 30 BRBS 175 (1996); *Holmes v. Universal Mar. Serv. Corp.,* 29 BRBS 18 (1995); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989). If the employer does not offer substantial evidence to rebut the presumption, the presumption provided by section 20(a) will entitle the claimant to compensation. *See Del Vecchio v. Bowers*, 296 U.S. 280, 284-285 (1935).

If the Administrative Law Judge finds the presumption is rebutted, it no longer controls and he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Devine v. Atl. Container Lines, G.T.E.*, 25 BRBS 15 (1991).

In this case, the parties have stipulated, and I find, that a work-related injury occurred on January 22, 2000, within the course and scope of employment with the Employer. As stated by Dr. Holencik, this injury involved a shoulder dislocation. (EX 42 at 19). Additionally, I find that the Claimant tore his rotator cuff during rehabilitation in connection with surgery to repair the shoulder dislocation. Dr. Holencik, who provided the bulk of the Claimant's treatment for his January 22, 2000 injury, testified to this series of events in his deposition. (EX 42 at 21). Moreover, this account is consistent with many of the other physicians' opinions in the record. Specifically Dr. Mauer diagnosed a rotator cuff tear on September 24, 2002. (CX 21). Dr. Montisano stated, in a letter dated August 27, 2004, that subsequent surgery would be necessary "to completely restore the Claimant's rotator cuff." (CX 23). Dr. Van Giesen also diagnosed a rotator cuff condition. (EX 18 at 3).

Therefore, there is no issue as whether the Claimant's has established the requisite element of "injury" with respect to his January 22, 2000 incident. The Claimant has also established that his torn rotator cuff meets this requirement as well. The Claimant has established the *prima facie* case that his torn rotator cuff was work-related. Specifically, the medical evidence described above shows that this condition "naturally or unavoidably" resulted from an injury incurred in the course of employment. The Employer has offered no evidence that would sever the connection between the rotator cuff tear and the Claimant's employment. Therefore, the Claimant has established "injury" with respect to both the January 22, 2000 incident and the subsequent rotator cuff tear that resulted from his treatment for that accident.

Moreover, I find that the two injuries "fuse together into one compensable injury." *Cyr*, 211 F.2d at 457. Because the Claimant was in treatment for his workplace injury when he incurred the rotator cuff tear, the second injury naturally and directly resulted from the first. Moreover, there is no evidence of any independent cause precipitating the rotator cuff tear. Therefore, both injuries legally equate to one compensable injury for the purpose of this litigation.

F. DISABILITY

Section 2(10) of the LHWCA defines "disability" as the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10); *see also, Metro Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 127 (1997). In order for a claimant to receive disability benefits, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. of Am.*, 25 BRBS 100, 110 (1991); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. *Am. Mut. Ins. Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. *Id*. at 1266.

The claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of a work-related injury without the benefit of the Section 20 presumption. *Lombardi v. Universal Mar. Serv.*, 32 BRBS 83 (1998); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); and, *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once the claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Air Am. v. Director*, 597 F.2d 773 (1st Cir. 1979); *Am. Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Indus.*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984).

1. EXTENT OF DISABILITY - TOTAL vs. PARTIAL

Claimant's Burden

A claimant has the burden of proving a *prima facie* case of total disability by showing he cannot return to his regular employment due to a work-related injury. *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). At the initial stage, a claimant need not establish he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984). A claimant may meet this burden by demonstrating physical restrictions[19] that prevent him from performing his usual job. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).[20] A claimant's "usual" job refers to his regular duties at

[19] In *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 692 (1982), the Board described the requisite condition as the claimant's "anatomical impairment."

[20] In that case, the administrative law judge found the claimant to be totally disabled due to permanent restrictions against heavy lifting and excessive bending that prevented him from resuming his usual job as sandblaster.

the time of the injury. *See Ramirez*, 14 BRBS at 692-93. In meeting this burden, the Board has emphasized that a claimant must relate his medical restrictions to the specific requirements of that job. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176, 178 (1985). However, even if physically capable of performing the required tasks of a particular job, a claimant may alternatively meet this burden by establishing that his work would subject him to constant excruciating pain. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944 (5th Cir. 1992); *La. Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000).[21]

The Administrative Law Judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). In doing so, an Administrative Law Judge is not bound to accept the opinion of any particular witness but rather, is entitled to weigh the credibility of all witness, including doctors, and draw his own inferences from the evidence. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998). The Board held, in *Lombardi*, that the credited medical opinion of a claimant's treating orthopedic surgeon, in connection with the claimant's testimony regarding his job requirements, constituted substantial evidence in support of a determination that the claimant's impairment prevented him from performing his usual employment duties. *Id*.

In this case, the Claimant has met his initial burden by establishing that work would subject him to constant excruciating pain.

I note, at the outset, that the Claimant has not established that his physical, or anatomical, limitations prevent him from performing the specific tasks of his usual employment. Because the Claimant was employed as a bartender at the time of his January 22, 2000 injury, that position constitutes his "usual" employment for the purpose of this litigation. That position primarily required the Claimant to dispense beer in plastic cups and collect cash payment from customers. (EX 36 at 14). The Claimant also alluded to having to lift cases of beer as part of the job, although the record does not reflect with what frequency. (EX 36 at 22).

The medical evidence in the record does not relate the Claimant's physical limitations to these specific requirements of his job. On one occasion, Dr. Montisano stated that the Claimant was unable to perform overhead work of stocking and carrying. (CX 22). However, the record does not reflect that he regularly engaged in these tasks in his job. Nor is there any indication that Dr. Montisano considered the specific requirement of the Claimant's job in arriving at this conclusion.[22] Therefore, this singular statement is not sufficient for the Claimant to meet his initial burden. Moreover, the remaining medical evidence concluding that the Claimant is unable to work amounts to general opinions about the Claimant's employability. For example, Dr.

Harrison, 21 BRBS at 343.

[21] A claimant's credible complaints of pain alone are sufficient to satisfy his initial burden of proof under the theory of constant pain. *Miranda v. Excavation Constr. Inc.*, 13 BRBS 882, 884 (1981). *Cf. Peterson v. Wash. Metro Area Transit Auth.*, 13 BRBS 891 (1981)(holding that an administrative law judge may find an employee able to do his usual work despite complaints of pain when a physician finds no functional impairment.).

[22] Here, I note the similarity between this situation and *Carroll*. In that case, the Board vacated an administrative law judge's finding of total disability predicated upon a physician's opinion that referenced general characteristics of the claimant's type of work. The Board found that the physician had not demonstrated knowledge of the specific requirements of the claimant's particular job. Therefore, his opinion was insufficient as a basis for finding total disability. *Carroll*, 17 BRBS at 178.

Holencik has opined, on several occasions, that the Claimant is unable to engage in any type of gainful employment. (CX 18; CX 24). Dr. Montisano also stated generally that the Claimant's physical condition prevents him from working as a bartender. (CX 23). These general conclusions are insufficient for establishing that the Claimant's physical limitations have left him unable to perform the specific tasks of his usual employment.[23]

The Claimant has, however, met his initial burden by demonstrating that returning to work would subject him to constant excruciating pain.[24] As noted above, a claimant's credible complaints alone are sufficient to satisfy this initial burden. *See supra*, note 22. In this case, I find the Claimant to be a moderately credible witness and he has testified as to constant pain. Moreover, those complaints are buoyed by a bevy of medical evidence that also documents his constant pain.

The Claimant testified that he experiences pain "twenty-four hours a day" which prevents him from working. (EX 36 at 45). He further testified that pain medication has been ineffective. (TR 35). The Claimant's complaints are well-supported by the medical evidence in the record. Drs. Woods, Holencik, and Montisano all documented the Claimant's persistent pain throughout their respective courses of treatment. Dr. Holencik also clinically explained how the Claimant's particular shoulder condition gives rise to such persistent pain. (EX 42 at 41-45). Dr. Holencik further explained that any movement of the right extremity will precipitate this pain. (EX 42 at 42-44).

Thus, the Claimant's moderately credible complaints combined with consistent medical evidence establish constant pain. Therefore, the Claimant has established that he could not return to work as a bartender because of his constant excruciating pain. Accordingly, he has met his initial burden of establishing total disability.

Suitable Alternate Employment

Once the claimant meets his *prima facie* showing that he cannot return to his usual work, the burden shifts to the employer to show suitable alternative employment or realistic job opportunities in the relevant geographic market which the claimant is capable of performing and which he could secure if he diligently tried. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 62 (3d Cir. 1979) *aff'g in pertinent part* 7 BRBS 333 (1977).[25] The relevant geographic market or the claimant's local community has been interpreted to mean the community in which the injury occurred. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031 (5th Cir. 1981). If the employer establishes the existence of such employment, the employee's disability is treated as partial, not total. *Rinaldi v.*

[23] In particular, considering only his physical limitations, this Court is left wondering why the Claimant could not dispense beer and collect cash payment using primarily with his left extremity.

[24] I note that the Claimant was fired from his job at the Community Club on March 27, 2000. Because, however, the focal point of this inquiry is the Claimant's ability to return to his "usual employment," as defined above, that fact is irrelevant here.

[25] If it is found that an employer has not established the availability of suitable alternate employment, the issue of whether the claimant diligently sought work need not be addressed. *Carlisle v. Bunge Corp*., 33 BRBS 133 (1999) n.15, *citing Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); *Williams v. Halter Marine Serv., Inc*., 19 BRBS 248 (1987).

General Shipbuilding Co., 25 BRBS 128 (1991); *Seguro v. Universal Mar. Serv. Corp.*, 36 BRBS 28 (2002). However, a failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Am. Stevedores v. Salzano*, 538 F.2d 933, 935 (2d Cir. 1976).

To meet this burden, the employer must establish the existence of realistically available job opportunities within the relevant geographic market, which the claimant is capable of performing. *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303, 305 (1992)(citing *Turner*, 661 F.2d at 1042-43). This burden implicates two discreet showings: availability and suitability.

With respect to the former, there exists some disagreement in the Courts of Appeal over the level of specificity with which an employer must demonstrate the availability of such opportunities[26] In an attempt to reconcile these varying positions, the Board held that an employer met its burden by demonstrating both the existence of one specific job suitable for the claimant and the general availability of similar jobs in the relevant market during the relevant time. *Berezin v. Cascade Gen. Inc.*, 34 BRBS 163, 166 (2000).

With respect to suitability, the employer must present evidence of jobs that the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *Armfield*, 25 BRBS at 305; *Clophus*, 21 BRBS at 265. This evidence, however, would not suffice if the jobs presented would subject the claimant to constant pain. *Mijanos*, 948 F.2d at 944.[27]

In this case, the Employer has not met its burden of demonstrating alternate employment because the evidence offered does not meet the suitability requirement. The Employer has offered a Labor Market Survey in an attempt to show the availability of alternate employment for the Claimant. (CX 27, 32, 33, 39).

The Employer has met the requirement of availability. It has offered evidence of numerous specific open positions in the relevant market, including names of employers, job descriptions, and contact information. This evidence far exceeds what the Board found to suffice in *Berezin*.

However, given the Claimant's persistent pain, the Employer has not demonstrated that these jobs are suitable. In accounting for the Claimant's physical limitations, the Survey addresses only the Claimant's mechanical, or anatomical, restrictions (e.g. limitations on lifting, overhead work, etc.). While the Survey goes to great lengths to account for these limitations, it does account for the Claimant's pain.[28] Therefore, the Employer has not demonstrated that the

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[26] *Compare Turner*, 661 F.2d at 1042-43 (requiring the employer to demonstrate that jobs exist in the relevant market that the claimant could perform) *with Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1330 (9th Cir. 1980) (holding that "the employer must point to specific jobs that the claimant can perform.").

[27] *See also Newport News Shipbuilding & Dry Dock Co. v. Wiggins*, No. 00-2532, slip op. at 7 (4th Cir. Dec. 14, 2001)(holding that employment subjecting the claimant to considerable pain and discomfort "does not constitute suitable alternate employment.").

[28] Moreover, it appears that the Claimant's persistent pain was not substantially considered when the list of jobs was developed. The Survey includes a reference to his complaints of pain under the heading "subjective complaints." (EX 27 at 3). However, on each page listing available jobs, the Claimant's "physical capability" refers to the

Claimant would not be subjected to persistent pain if he were to engage in any of the jobs listed in the Survey. Accordingly, the Employer has not established that the proffered alternate work is indeed suitable.

Therefore, because the Claimant met his burden of establishing a *prima facie* case by demonstrating that he cannot return to his usual employment due to a work-related injury, and the Employer has not established suitable alternate employment, I find the Claimant to be totally disabled.

2. NATURE OF DISABILITY - PERMANENT vs. TEMPORARY

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Gen. Dynamics Corp. v. Benefits Review Bd.*, 565 F.2d 208 (2d Cir. 1977); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. Gen. Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding and Constr. Co.*, 17 BRBS 56 (1985); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984).

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement" ("MMI"). An injured worker's impairment may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of MMI. *James v. Pate Stevedoring Co*., 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *see SGS Control Servs. v. Director, OWCP*, 86 F.3d 438, 443-44 (5th Cir. 1996); *Director, OWCP*, *v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1991). Any disability before reaching MMI would be temporary in nature. *Id*. If a claimant shows he is disabled under the LHWCA and MMI has not been reached, the appropriate remedy is an award of temporary total or partial disability, under Section 8(b) or (e). *Carlisle v. Bunge Corp*., 33 BRBS 133 (1999) n.10, (*citing* 33 U.S.C. § 908(b); *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990)).

The determination of when MMI is reached, so that a claimant's disability may be said to be "permanent," is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168 (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Wash. Metro. Area Transit Auth.*, 21 BRBS 248 (1988); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Eckley v. Fibrex & Shipping Company*, 21 BRBS 120 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

Permanent disability has been found where little hope exists of eventual recovery, *Air Am., Inc. v. Director, OWCP*, 597 F.2d 773 (1st Cir. 1979). Additionally, where a claimant would otherwise be deemed permanently disabled, a physician's recommendation of a further medical procedure that may result in improvement may not be the basis for finding that MMI has not been reached. *Meecke v. I.S.O. Personnel Support Dep't*, 10 BRBS 670, 676 (1979). Moreover, the Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent

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mechanical restrictions of his right shoulder but makes no reference to persistent pain.

disability. *Exxon Corp. v. White*, 617 F.2d 292 (5th Cir. 1980), *aff'g* 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Watson v. Gulf Stevedore Corp., supra*.

The date of MMI is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition becomes permanent is primarily a medical determination, regardless of economic or vocational considerations. *Manson v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984); *La. Ins. Guar. Ass'n v. Abbott*, 27 BRBS 192 (1993), *aff'd* 40 F. 3d 122 (5th Cir. 1994)(doctor said nothing further could be done); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, (Brickhouse),* 315 F.3d 286 (4th Cir. 2002); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184, 186 (1988). Medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). A date of permanency may not be based, however, on the mere speculation of a physician. *See Steig v. Lockheed Shipbuilding & Constr. Co.*, 3 BRBS 439, 441 (1976). Furthermore, evidence of the ability to do alternate employment is not relevant to the determination of permanency. *Berkstresser v. Wash. Metro. Area Transit Auth.*, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom.*, *Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

Upon finding MMI, an Administrative Law Judge must make a specific factual finding regarding the date of maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Eng'rs*, 14 BRBS 395, 401 (1985). The date a physician assessed a claimant with a disability rating is sufficient to determine date of permanency. *Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988). Additionally, subsequent medical opinions that find MMI may support a finding of permanency at an earlier date. *See Miranda*, 13 BRBS at 884.

In this case, the medical evidence establishes that the Claimant is permanently disabled. Four physicians have offered opinions stating as much. Both Drs. Mauer and Eagle stated, on July 11, 2003 and August 5, 2005 respectively, that the Claimant has reached MMI. (EX 21 at 10; EX 15 at 96). Additionally, after monitoring the Claimant's rehabilitation for his July 14, 2000 surgery, Dr. Holencik observed, on March 5, 2002, that "no marked improvement for the future is foreseeable." (EX 15 at 96). Finally, Dr. Montisano, who also provided regular treatment, stated on June 7, 2002 that "[t]here's definitely nothing more that can be done with his shoulder." (EX 14 at 24).

One physician's opinion counsels against a finding of permanent disability. On April 24, 2002, Dr. Van Giesen stated that the Claimant had not yet achieved MMI. He also recommended additional surgery and rehabilitation and "suspected" improvement if this course were successful. (EX 18 at 7).

On the issue of disability permanency, I find that the four opinions detailed above outweigh the single contrary opinion of Dr. Van Giesen. Additionally, I accord Dr. Van Giesen's

opinion diminished weight because he conclusion is, at least in part, predicated upon a recommendation of future surgery and an anticipated resulting improvement. This opinion is similar to that in *Meecke*, which the Board expressly found insufficient as a basis for finding temporary disability.[29] Therefore, based on both the overall weight of the evidence and the nature of the single contrary opinion, I find that the Claimant has established permanent disability.

I further find the date of MMI to be March 5, 2002. This date represents the date of Dr. Holencik's disability rating in which he found the Claimant to be permanently disabled. (*see* EX 15 at 96). As such, this finding is consistent with the Board's holding in *Jones*. Additionally, I note that Dr. Montisano, Mauer, and Eagle all found the Claimant to have reached MMI subsequent to Dr. Holencik's finding. Therefore, as was true in *Miranda*, these opinions are supportive of finding March 5, 2002 to be the date of permanency in this case.

3. CONCLUSIONS REGARDING NATURE & EXTENT OF DISABILITY

In conclusion, based on the Claimant's testimony and the medical evidence in the record, I find that the Claimant is entitled to permanent total disability benefits.

MEDICAL EXPENSES AND BENEFITS

Section 7(a) of the LHWCA provides that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); *see also* 20 C.F.R. § 702.401. In order for a claimant to receive medical expenses, his injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). If an employer is found to be liable for the payment of compensation pursuant to an award of disability, it follows, in accordance with Section 7(a), that the employer is likewise liable for medical expenses incurred as a result of the claimant's injury. *Perez v. Sea-Land Servs*, *Inc.*, 8 BRBS 130, 140 (1978).[30]

Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.,* 22 BRBS 32, 36 (1989); *Mayfield v. Atl. & Gulf Stevedores,* 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.,* 7 BRBS 234 (1977).

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[29] While I find similarities between this situation and *Meecke*, I note the two are not identical. Namely, the crux of the physician's opinion in *Meecke* that the claimant's injuries would become more stationary and rateable with additional treatment. *Meecke*, 10 BRBS at 676. In this case, Dr. Van Giesen's opinion spoke directly to future medical improvement. However, the salient point, in the application of *Meecke*, is the affect of a doctor's call for additional medical procedures in finding that MMI has not yet been reached. Also important is respective lack of certainty that the recommended treatment would yield improvement.

[30] *See Shriver v. General Dynamics Corp*., 34 BRBS 370(ALJ)(2000) for an exhaustive list of medical expenses the appellate courts and the Board have approved and disapproved. *See Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997) where the Board reversed prior decisions to hold interest may be assessed on past-due sums for medical services whether the costs were initially borne by the claimant or the providers. In *Plappert v. Marine Corps. Exch.*, 31 BRBS 13 (1997), the Board found the employer entitled to a hearing over "contested" medical expenses. In *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996), the Board ruled there is no section 20(a) presumption concerning such bills.

A claimant has established a prima facie case for compensable medical treatments when a physician finds treatment necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). In order for an employer to be liable for a claimant's medical expenses pursuant to Section 7(a), the expenses must be reasonable and necessary.[31] *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The employer must raise the issue of reasonableness and necessity of treatment.[32] *Salusky v. Army Air Force Exchange Service*, 2 BRBS 22, 26 (1975). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. Gen. Dynamics Corp.*, 21 BRBS 219 (1988); *Barbour v. Woodward & Lothrop, Inc*., 16 BRBS 300 (1984).

An employee's right to select his own physician, pursuant to Section 7(b), is well-settled.[33] *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978); 20 C.F.R. § 702.403; *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998) *modified*, 164 F.3d 480 (1999). A claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. Gen. Dynamics Corp.*, 22 BRBS 356 (1989); *Gilliam v. W. Union Tel. Co.*, 8 BRBS 278 (1978); 20 C.F.R. § 702.401(a); *but see Shoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996)(expenses may be limited to those costs which would have been incurred locally).

In *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. *Banks v. Bath Iron Works Corp.*, 22 BRBS 301, 307-08 (1989); *Jackson v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 15 BRBS 299 (1983); *Beynum v. Wash. Metro. Area Transit Auth.*, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. *Atl. & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *Matthews v. Jeffboat, Inc.*, 18 BRBS 185, 189 (1986). The burden of proving compliance with section 7(d) is on the claimant. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 407, 10 BRBS 1, 8 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977).

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[31] The employer is liable for medical services for all legitimate consequences of the compensable injury, including the chosen physician's unskillfulness or errors of judgment. *Linsay v. George Wash. Univ.*, 279 F.2d 819 (D.C. Cir. 1960); *see also Austin v. Johns-Manville Sales Corp*., 508 F.Supp. 313 (D. Me. 1981). *Wheeler v. Interocean Stevedoring*, 21 BRBS 33 (1988)(Improper, unauthorized medical treatment is not reimbursable).

[32] In *Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169,172 (1988), the Board held that where relevant evidence established that the claimant's psychological condition was occasioned, at least in part, by her work injury, treatment received by the claimant for this condition was compensable under the LHWCA. *See also, Zeigler v. Dep't of the Army*, BRB No. 99-0122 (Oct. 7, 1999)(unpublished)(early-stage Lyme disease precipitated psychological impairment).

[33] The District Director, not the judge, has the discretionary authority to change a claimant's physician. Thus, the decision is directly reviewable by direct appeal to the Board rather than a hearing before an ALJ. *Jackson v. Universal Mar. Serv. Corp*., 31 BRBS 103 (1997).

In light of my findings that the Claimant is totally and permanently disabled due to injuries of his right upper extremity initially suffered in the January 22, 2000 accident, I find his treatment for the same, including physical therapy, prescribed pain medication, resulting psychological treatment,[34] and any further evaluation and treatment, was and is compensable under the LHWCA.[35] The Claimant shall present any related unpaid medical bills to the Employer within thirty days of the date of this Decision & Order and the latter shall reimburse the same.

COMPENSATION FORMULAE

Section 8 of the Act, identifies four different categories of disability and sets forth the scheme for the payment of compensation for disability for each. Section 8(a) states that the compensation formula for permanent total disability is 66 2/3 percent of the Claimant's AWW, under section 8(a), during the continuance of such total disability. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (July 17, 2001).

AVERAGE WEEKLY WAGE

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. *Todd Shipyards Corp. v. Black,* 717 F.2d 1280 (9th Cir. 1983) *cert. denied*, 466 U.S. 937 (1984); *Hoey v. Gen. Dynamics Corp.*, 17 BRBS 229 (1985); *Pitts v. Bethlehem Steel Corp.*, 17 BRBS 17 (1985); *Yalowchuck v. Gen. Dynamics Corp.*, 17 BRBS 13 (1985). Compensation should be calculated at the time of disability, not the time of the injury. *Johnson v. Director, OWCP*, 911 F.2d 247 (9th Cir. 1990); *Bourgeois v. Avondale Shipyards & Director, OWCP,* 121 F.3d 219 (5th Cir. 1997).

The parties have stipulated and I find that the Claimant's AWW is $376.97 and his compensation rate is $251.62.

SECTION 8(f) RELIEF

Under the traditional "aggravation rule" of workers' compensation law, an employer is liable for a worker's entire disability even though the disability was the result of both a current employment injury and a pre-existing impairment.[36] Congress enacted section 8(f) of the LHWCA, 33 U.S.C. § 908(f), to diminish an employer's incentive to discriminate against partially disabled workers out of a fear of increased liability under the aggravation rule. *Director, OWCP, v. Bethlehem Steel Corp*., 868 F.2d 759, 761 (5th Cir. 1989); *Director, OWCP,*

[34] It is well settled that a psychological impairment which is work-related is compensable under the LHWCA. *Zeigler v. Dep't of the Army*, BRB No. 99-0122 (Oct. 7, 1999)(unpublished)(citing *Pietrunti v. Director, OWCP*, 119 F.3d 1035 (2d. Cir. 1997); *Sanders v. Ala. Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989)).
[35] See 20 C.F.R. § 702.413 for disputes concerning the amount of a medical bill.
[36] *See* 20 C.F.R. § 702.144-148.

v. Newport News Shipbuilding & Dry Dock Co.[Langley], 676 F.2d 110, 112 (4th Cir. 1982). In furtherance of this goal, the provisions of Section 8(f) are to be liberally construed. *See, Director, OWCP, v. Todd Shipyard Corp.*, 625 F.2d 317 (9th Cir. 1980); *Md. Shipbuilding & Dry Dock Co. v. Director, OWCP*, 12 BRBS 77, 81 (4th Cir. 1980).

Section 8(f) places a temporal limitation on an employer's liability, i.e., 104 weeks or the number specifically designated by statute in relation to that injury, for a work-related permanent disability if the employee had an "existing permanent partial disability" that contributed to the current employment injury. *See* 33 U.S.C. § 908(f) and 20 C.F.R. § 702.145. Payments after the employer's liability expires are then paid from the "second injury fund" or "Special Fund"` established by section 44 of the LHWCA, 33 U.S.C. § 944, and financed by members of the industries covered by the Act.

Failure to Raise § 8(f) Defense

In 1984, Congress amended § 8(f) to require that entitlement to § 8(f) relief be raised and documented during informal proceedings before the deputy commissioner. The section, as amended, states:

> Any request . . . for apportionment of liability to the special fund . . . for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

An employer's failure to raise the issue of § 8(f) relief before the District Director, however, is an affirmative defense which must be raised and pleaded by the Director. 20 C.F.R. § 702.321(b)(3). The Director must raise this defense before the Administrative Law Judge. *Abbey v. Navy Exchange*, 30 BRBS 139, 142 (1996)[37] In this regard, the Board characterized the Director as "the guardian of the Special Fund." *Id*. at 141. Accordingly, a statement in the transmittal letter from the District Director to the Office of Administrative Law Judges that the Employer had not claimed § 8(f) relief is not sufficient for the Director to assert the defense. *Id.* at 143.

In this case, the District Director informed the Chief Administrative Law Judge, in its transmittal letter dated April 27, 2005, that § 8(f) relief "is not an issue and has not been considered by [the District Director]." This statement indicates that the Employer did not raise the issue of § 8(f) relief before the District Director. Moreover, there is no countervailing evidence in the record indicating that the Employer ever raised the issue of § 8(f) relief before the District Director. Nevertheless, because the Director did not raise and plead the defense as

[37] Additionally, in *Abbey*, the Board noted that in cases where the Director asserted this affirmative defense, he appeared before the Administrative Law Judge.

the Regulations require, I will not consider whether it applies in this case.[38] Accordingly, I consider the merits of the Employer's request for § 8(f) relief.

Evaluation of § 8(f) Entitlement

To obtain special fund relief under section 8(f), when an employee is totally disabled by a second injury, an employer must show that:

> (1) The employee had a pre-existing permanent partial disability before the most recent employment injury;
> (2) The pre-existing permanent partial disability was manifest to the employer prior to the current employment injury; and,
> (3) Depending on whether the present disability is total or partial,
>
> (a) The current permanent total disability was not solely due to the most recent employment injury; or,
>
> (b) The current permanent partial disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone" without the contribution of the preexisting permanent partial disability.[39]

To qualify as "pre-existing," the condition must exist before the work-related injury; a disability which occurs simultaneously will not meet the requirement. *See Fineman v. Newport News Shipbuilding & Dry Dock, Inc*., 27 BRBS 104 (1993) (*citing Newport News Shipbuilding & Dry Dock, Inc., v. Harris*, 934 F.2d 548 (4th Cir. 1991)); *Director, OWCP v. Bath Iron Works Corp.*, 129 F.3d 45 (1st Cir. 1997). An existing permanent partial disability for the purposes of Section 8(f) can be a schedule injury, compensable under Sections 8(c)(1) through (20), a non-schedule injury, compensable under Section 8(c)(21), or a non-compensable but still substantial mental or physical disability. *See C & P Telephone v. Director, OWCP [Glover]*, 564 F.2d 503, 513 (D.C. Cir. 1977). In this context, "disability" encompasses a greater range of conditions than it would under the narrower meaning set forth in Section 2(10) of the Act. *See Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 206 (1949).One may be found to have a pre-existing disability even if able to work full time in the identical position. *Bath Iron Works* 129 F.3d at 50.

The mere fact that an employee had previously sustained an injury does not, standing alone, establish preexisting permanent partial disability. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145 (9th Cir. 1991). To determine "disability" under § 8(f), many courts look to the D.C. Circuit's "cautious employer" test, which considers, whether "the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related

[38] Moreover, as *Abbey* makes clear, the information provided by the District Director in its transmittal letter is insufficient to implicate this defense.

[39] Some combine the third and fourth tests and rephrase the third test to state "such pre-existing disability, in combination with the subsequent work injury, contributes to a greater degree of permanent disability than that which would result from the second injury alone" based on Ninth Circuit opinions. *See, Director, OWCP, v. Campbell Indus., Inc.*, 678 F.2d 836, 839-40 (9th Cir. 1982) *cert. den*., 459 U.S. 1104 (1983), *overruled on other grounds by Director, OWCP, v. Cargill, Inc*., 709 F.2d 616, 619 (9th Cir. 1983)(*en banc*).

accident and compensation liability." *Glover*, 564 F.2d at 513.[40] Courts have also considered whether an employee worked with restrictions after the initial injury and whether he experienced continuing symptoms. *See Lockheed Shipbuilding*, 951 F.2d at 1145. However, § 8(f) relief may be denied if the claimant resumed regular physical labor after recovering from his previous injuries. *Legrow*, 935 F. 2d at 436.

With respect to the "manifestation" requirement, a diagnosed pre-existing disability of which an employer has actual knowledge is manifest. The pre-existing disability need not be manifest at the time of hiring, but only at the time of the compensable subsequent injury. *See Cargill*, 709 F.2d at 619; *Berkstresser*, 921 F.2d at 307. The employer need not be absolutely sure that the condition is permanent; its permanence may be uncertain and yet cause a cautious employer to discriminate. *See Director, OWCP v. Gen. Dynamics Corp.*, 980 F.2d 74, 80-83 (1st Cir. 1992). Thus, the pre-existing disability need not be a serious condition that actually impairs the employee at the time of hiring or retention, an asymptomatic condition may suffice. *Id*[41] Finally, if the condition is readily discoverable from the employee's medical records in the possession of the employer, the employer is deemed to have knowledge of the condition. *Bunge Corp. v. Director, OWCP*, 951 F. 2d 1109, 1111 (9th Cir. 1991).

With respect to the third prong of the test, the proper analysis turns on whether the employee now suffers from a total or partial disability. Where the employee is now fully disabled, the employer must show that the disability is not due solely to the most recent injury. *Pa. Tidewater Dock Co. v. Director, OWCP,* 202 F.3d 565 (3d Cir. 2000); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1352 (9th Cir. 1993); *Todd Pacific Shipyards Corp. v. Director, OWCP*, 913 F.2d 1426, 1429 (9th Cir. 1990). "Thus, if the employment injury was sufficient, by itself, to cause the claimant's total permanent disability, the employer should be liable for the entire compensation award and section 8(f) relief should be denied. The aggravation rule that section 8(f) was intended to counteract never comes into play under these circumstances because the employer would be liable to the same extent if an able-bodied employee suffered the same injury." *Ceres Marine Terminal, Ceres Gulf, Inc., v. Director, OWCP*, 118 F.3d 387, 390 (5th Cir. 1997). An employer cannot satisfy the § 8(f) standard merely by demonstrating that the employee's pre-existing injury compounded his employment-related injury; rather, the employer must show that but for pre-existing disability, the claimant would be employable. *Director, OWCP v. Jaffe N.Y. Decorating*, 25 F.3d 1080, 1085 (D.C. Cir. 1994); *Director, OWCP v. Bath Iron Works Corp.* 129 F.3d 45 (1st Cir. 1997).

In case where the employee is partially disabled, the employer must show that the current permanent disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 980(f); *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 293 (1995); *Director, OWCP v. Ingalls Shipbuilding, Inc*., 125 F.3d 303 (5th Cir. 1997). A "heavier burden" is placed on the employer to obtain Section 8(f) relief in the case of a

[40] Both the Ninth and First Circuits have also employed this test. *See e.g. Campbell Indus.,* 678 F.2d at 840; *CNA Ins. Co. v. Legrow*, 935 F.2d 430 (1st Cir. 1991). The Ninth Circuit, however, has commented that this test is only "sometimes used." *Todd Shipyards Corp. v. Director, OWCP*, 793 F.2d 1012, 1013 (9th Cir, 1986).

[41] *But see Kubin v. Pro-Football, Inc*., 29 BRBS 117 (1995), where a single earlier instance of the claimant complaining of low back discomfort and the record demonstrated his "normal" condition following the "injuries" did not make the condition manifest.

permanently partially disabled employee than in the case of a fully disabled employee. *Bath Iron Works Corp.*, 129 F.3d at 51 (*citing Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.* (*Harcum I*), 8 F.3d 175, 185 (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122 (1995) (*citing Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 750 (5th Cir. 1990))). An employer must establish the degree (or "quantify") of disability attributable to the work-related injury, so that this amount may be compared to the total percentage of the partial disability for which coverage under the LHWCA is sought. *Bath Iron Works Corp.* 129 F.3d at 51. It is not enough for an employer to only show medical evidence that a percentage of whole body impairment existed before the work-related injury, that a greater percentage of the whole body impairment exists after the work-related injury, and that the ultimate permanent partial disability was causally connected to the earlier impairment to satisfy its burden of the contribution element. *Id.* (*citing Harcum I*, 8 F.3d at 184).

In this case, the Employer is not entitled to § 8(f) relief because it has not established preexisting permanent partial disability. The Employer has not demonstrated that any effect of the Claimant's 1997 injury would present an increased risk of accident-related injury and compensation liability such that a cautious employer would fire him as a result. The Claimant's recovery and ultimate return to his usual work without restriction further counters the position such a termination would be warranted. Indeed, while the Claimant was subject to work restrictions immediately following his treatment for the 1997 injury, Dr. Woods ultimately cleared him to return to work without restriction. (EX 15 at 26). Dr. Woods' conclusion is consistent with the Claimant's own account of his condition after the 1997 injury. Specifically, he testified that his injury was "fixed" and that he had "no trouble" performing his job after treatment. (TR 30). He also testified that prior to the most recent injury, he was good at his job, even at the busiest times. (TR 86-91). Therefore, as was the case in *Legrow*, the Claimant resumed his regular work after recovery from his injury.[42] Therefore, the Employer has not established the first prong of the test for § 8(f) relief. Accordingly, consideration of the second and third elements of the § 8(f) standard is moot.

INTEREST

A claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The rate is that used by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills… ." *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 270 (1984), *modified on recon.*, 17 BRBS 20 (1985). Interest is mandatory and cannot be waived in contested cases. *Byrum v.*

[42] I note, however, that after the 1997 injury, Dr. Herbert opined that the Claimant would have a permanent restriction on lifting heavy kegs of beer and an unspecified restriction on strenuous overhead lifting. (EX 15 at 27). Additionally, Dr. Mauer opined that the Claimant may have a permanent restriction on lifting over 75 pounds. (EX 21 at 3). These restrictions, however, did not limit the Claimant from performing his usual work. Lifting heavy objects was not a regular part of the Claimant's bartender position. The Claimant did not include this task when describing his job. (*see* TR 49). There is no other evidence in the record that he regularly engaged in heavy lifting. Therefore, these restrictions do not counter the similarity between this case and *Legrow*, in which the Court denied § 8(f) relief where the claimant could perform his *regular* physical labor after recovering from a previous injury. *See Legrow*, 935 F. 2d at 436 (emphasis added).

Newport News Shipbuilding & Dry Dock Co., 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). The Board has held that the date that employer knows of an injury and therefore incurs an obligation to pay benefits under 33 U.S.C. §914(b) is critical in determining the onset date for the accrual of interest. *Renfroe v. Ingalls Shipbuilding, Inc.,* 30 BRBS 101 (1996)(retired employee with hearing loss), at 105-106; *Meadry v. Int'l Paper Co.*, 30 BRBS 160 (1996).

Here, the Employer ceased its payment of benefits on August 5, 2004. Thus, interest must accrue from August 6, 2004. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

V. CONCLUSIONS

I find that the Claimant is totally and permanently disabled from performing his usual employment as a bartender. The responsible employer is the Department of the Army. The date of maximum medical improvement is March 5, 2002. The Claimant's average weekly wage is $376.97. Furthermore, the Employer is liable for all reasonable and necessary medical expenses incurred in the treatment of the Claimant's total and permanent disability. The Claimant is further entitled to interest at the appropriate rate on the accrued unpaid compensation benefits.

VI. ATTORNEY'S FEES AND COSTS

Thirty (30) days is hereby allowed to the claimant's counsel for the submission of such an application. See, 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany the application. Parties have fifteen (15) days following receipt of any such application within which to file any objections.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

a. The Employer shall pay to the Claimant compensation for his total permanent disability from August 6, 2004 through the present based upon an average weekly wage of $ $376.97, such compensation to be computed in accordance with section 8(a) of the LHWCA.
b. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his January 22, 2000 injury. The Employer shall also receive a refund, with appropriate interest, of all overpayments of compensation, if any, made to the Claimant herein.
c. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be

determined as of the filing date of the Decision & Order with the District Director. All under-payments of compensation shall be paid to the Claimant in a lump sum with interest at the rate provided in 28 U.S.C. § 1961. The District Director shall determine the exact amount.

d. Pursuant to § 7 of the LHWCA, the Employer shall furnish such reasonable, appropriate, and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of § 7 of the LHWCA.
e. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

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RICHARD A. MORGAN
Administrative Law Judge

APPEAL RIGHTS: Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeal with the district director for the compensation district in which the decision or order appealed from was filed, within thirty (30) days of the filing of the decision or order, and by submitting to the Board a petition for review, in accordance with the provisions of part 802 of 20 C.F.R..